IN THE

# Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

## No. 375

G. B. HOWELL, et al.,

*Petitioners,*

*vs.*

CHICAGO, WILMINGTON & FRANKLIN COAL COMPANY, INC., et al.,

*Respondents.*

**BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.**

CRAIG VAN METER,
Mattoon, Illinois,
FRED H. KELLY,
Mattoon, Illinois,
Attorneys for Respondent, SHELL OIL COMPANY, Incorporated, a Corporation.

THURLOW G. ESSINGTON,
231 S. LaSalle St.,
Chicago, Illinois,
Attorney for Respondent, CHICAGO WILMINGTON & FRANKLIN COAL COMPANY, INCORPORATED, a Corporation.

F. C. LOVE,
First National Building,
Oklahoma City, Oklahoma,
ROY C. MARTIN,
Benton, Illinois,
CARTER HARRISON,
Benton, Illinois,
Of Counsel.

BARNARD & MILLER, 35 S. Market St., Chicago. FRAnklin 0505

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## STATEMENT OF THE CASE.

Respondents deem it advisable to make a brief additional statement in order to bring before this Court the issues presented by the petition.

This is an action by the Shell Oil Company, Incorporated, and Chicago, Wilmington & Franklin Coal Company, Incorporated, as Plaintiffs, against John P. Minier, and others, as Defendants, to restrain the Defendants from drilling for or producing oil and gas from under the South One-Half ($S\frac{1}{2}$) of the Northeast Quarter ($NE\frac{1}{4}$) of Section Thirty-Six (36), Township Six (6) South, Range Two (2) East of the Third Principal Meridian, Franklin County,

Illinois. The Respondents, who were the Plaintiffs in the suit, assert that they, respectively, are the lessee and owner of the property rights in the coal, oil and gas underlying such property, together with the right to mine and remove the same, and the Defendants deny such right.

A controversy arises out of the construction of the warranty deed executed March 16, 1914, by the Defendants, John P. Minier and Rosa M. Minier, his wife, in favor of one Walter W. Williams, Plaintiff-Respondent, Chicago, Wilmington & Franklin Coal Company, by mesne conveyances, having acquired all of the interest of the grantee, Williams, thereunder and the Shell Oil Company, Incorporated, being the oil and gas lessee of such Coal Company.

On the said date the Miniers, being the owners of the fee simple title to the above property, conveyed to the said Williams all of the coal, oil and gas underlying such property together with the right to mine and remove said coal, oil and gas free and clear of any liability for damages for surface subsidence or otherwise to the owner of the superincumbent soil caused by the mining out of the coal, oil and gas. The said deed provided for mining rights and for the use of part of this land in connection with mining on this particular land and other lands not conveyed by this deed. This deed provided in regard thereto as follows (R. P. 14):

> "Together with the right to mine and remove said coal, oil and gas free and clear of any liability for damages for surface subsidence or otherwise to the owner of the superincumbent soil caused by the mining out of the coal, oil, or gas or from not leaving pillars or artificial supports under said lands and the further right to make and use underground passages or entries through said property to and from other mines and lands adjacent thereto and the right of removal

> of coal and other property therefrom, and with the right to the perpetual use of said passages and entries, for mining purposes and for such other purposes as the grantee, his heirs and assigns shall deem proper."

By such conveyance, Williams was granted in fee simple the coal, oil and gas, together with the right to mine and remove the same from this and adjoining land free and clear of liability for damages to the Miniers or other surface owners.

Continuing, then, the deed contained a special covenant that in addition to the estate so vested in the grantee he might purchase part of the surface in fee and take a deed therefor by paying therefor the sum of One Hundred Dollars per acre. This further option is set forth as follows (R. P. 87) (italics ours):

> "It is *also* covenanted and agreed that the grantee herein, his heirs and assigns, shall have the right *to take* and *use* so much of the surface of said land as *may be deemed necessary* for the purpose of erecting, maintaining and operating, hoisting, air, pumping, and escape shafts, drains, ditches and reservoirs, telephone and electric light, and power sites and the necessary roadways and railroad tracks to and from the same, with the right of way for any railroad necessary or required to carry said coal, *oil* and *gas* to market, but all the land the surface of which *is so taken* shall when occupied be paid for at the rate of one hundred ($100.00) dollars per acre."

It will be observed that such option permitted the grantee to locate the principal coal mine shaft and appurtenances on this land by paying for all surface taken for such purpose, One Hundred Dollars per acre.

Then it was provided that such option should remain in force for a period of two years from the time of the completion of the mine shaft intended to be used for mining

*coal* from under the land, the deed providing (R. P. 87-88) (italics ours):

> "It is understood that within two years after the mine shaft intended to be used for the purpose of removing the *coal* from under the premises herein is completed *all the surface privileges above set forth* that the grantee herein *desires to exercise* shall, either for mine switches or for *whatever* purpose, *be selected and paid for* and the grantor herein will execute a *deed* therefor, the surface privileges on the *remainder* of said land shall at the end of said two years be fully *released* and the right of the grantee herein *to take* any portion of the surface of the remainder of said lands is at an end."

The following additional requirement was made in regard to such surface which might be deeded to the grantee (R. P. 87-88) (italics ours):

> "It is understood that any surface *taken* by the grantee whether for switches or for any other purpose on or across the premises herein described shall be fenced with a lawful fence *within three months after a deed* to said surface is delivered and said fences shall at all times be kept in good repair by the grantee herein. It is also understood that in case any switches or mine tracks are constructed across said land by the grantee, his heirs or assigns, that at the request of the grantors herein, his heirs or assigns, a farm crossing shall be put in and maintained by the grantee."

It is the position of the Respondents that under such deed Williams was granted in fee simple the coal, oil and gas, with the right to mine and remove the same without liability to the surface owner for damages caused thereby, and that he was given the option of acquiring by deed a portion of the surface estate retained by the grantor to be used in mining coal by paying therefor the sum of One Hundred Dollars per acre within two years from the date of the completion of the mine shaft to be used for mining

coal from under the land. It, of course, follows, if this be the meaning of the instrument, that the loss of the option would have no effect upon the fee simple grant of the oil and gas together with the right to mine and remove the same without liability for damages for surface subsidence or otherwise.

It is the Petitioners' position, as we understand it, that the provisions relating to the forfeiture of the option of acquiring the portions of the surface are so broad as to work a forfeiture not only of the optional privileges to purchase in fee simple a part of the surface of the premises but also the grant, itself, insofar as it conveyed the oil and gas. Of course the only provision for a cessation of any right or privilege is the provision (italics ours) (R. P. 87):

> "the *surface* privileges on the remainder of said land shall at the end of said two years be fully released and the right of the grantee to *take* any portion of the *surface* of the remainder of said land is at an end."

It will be observed that there is no provision for a forfeiture or release of anything but "surface privileges." There is no attempt to terminate the grant of the oil and gas.

The District Court in its opinion, and the Circuit Court of Appeals in No. 7811, which was the appeal of Respondents, held that all rights of the Respondents to use the surface for oil and gas production had terminated but the District Court also held and the Circuit Court of Appeals, in No. 7812, which was the appeal of Petitioners, held that the property rights of the Respondents in the oil and gas had not been terminated.

In the petition for certiorari Petitioners state that they are requesting review of the judgment in No. 7811 only insofar as it may be affected by the question presented

here. Of course, they cannot properly ask for any review in No. 7811, which has been determined in their favor and in which Respondents have not asked for review. The decision of the Circuit Court of Appeals in No. 7811 is final and any discussion as to whether it is right or wrong would be out of place here. The decision in No. 7811 is, however, immaterial here as the law has been correctly announced in the Circuit Court of Appeals and District Court that the property rights of the Respondents have not been terminated in the oil and gas, irrespective of what their rights to use the surface may be.

It will be noted that the landowners, Miniers, under whom the Petitioners in the petition for certiorari are claiming as oil and gas lessees, have not petitioned for certiorari in this case and that as far as these landowners, the surface owners, are concerned the judgment of the Circuit Court of Appeals of the Seventh Circuit is now final.

## SUMMARY OF ARGUMENT.

**No grounds exist which would justify the exercise by this Court of its power to grant a writ of certiorari.**

**(I)**

**This case is not of sufficient gravity or general importance to justify this Court in granting a writ of certiorari.**

Under well-established principles the power of this Court in granting writs of certiorari under Section 240(a) of the Judicial Code (28 U. S. C. A. 347(a)) is to be exercised only when there are special and important reasons therefor.

The petition presents no questions of gravity or importance because of the legal, economic or social problems involved, and this litigation is not of such importance to justify this Court's issuance of its writ of certiorari.

**(II)**

**The Circuit Court of Appeals in rendering its opinion, did not decide an important question of local law in a way probably in conflict with applicable local decisions.**

The United States Circuit Court of Appeals for the Seventh Circuit followed the established judicial precedents in the State of Illinois in analyzing the issues and in reaching its decision in this case. The decision in this case is in entire accord with the Illinois law of real property. Both the District Court and the Circuit Court of

Appeals, both of which courts sit in the State of Illinois, considered the Illinois authorities and correctly based their decision in this case that the property rights of the Respondents in the oil and gas still exist, upon the Illinois precedents.

**(III)**

**The decision of the Circuit Court of Appeals is not in conflict with the decision of Eighth Circuit Court of Appeals in the case of Butler v. McGorrisk, 114 Fed. 300.**

## ARGUMENT.

### (I)

**This case is not of sufficient gravity or general importance to justify this Court in granting a writ of certiorari.**

Under the well-established principles the power of this Court to grant writs of certiorari under Section 240(a) of the Judicial Code (28 U. S. C. A. 347(a)) rests in the discretion of the Court. It has been many times declared that this is a power to be exercised sparingly, and only in cases where there are special and important reasons therefor, or in order to secure uniformity of decisions.

That this case which was submitted to and decided by the Circuit Court of Appeals is not of sufficient gravity or general importance to justify the exercise of the power to grant a writ of certiorari is apparent from the petition. This is just a private suit over title to property.

No important legal, economic or social problem is involved, and it is a question to be decided upon the ordinary principles of law, and is not a cause of special importance or gravity beyond the importance to the litigants themselves.

### (II)

**The Circuit Court of Appeals in rendering its opinion, did not decide an important question of local law in a way probably in conflict with applicable local decisions.**

The warranty deed (Respondents' Exhibit 1, R. P. 86-88) conveys and warrants "all the coal, oil and gas" underlying the eighty acres here involved. The only limita-

tion of any character appearing therein is the provision terminating certain particularly described "surface privileges" two years after the completion of the coal shaft therein referred to. Petitioners do not and can not point to any provision of the deed indicating that the parties intended to terminate or forfeit the grantee's estate in the minerals so conveyed. The statutory form warranty deed which conveys and warrants "all" of the coal, oil and gas underlying the eighty acres here involved negatives such thought. Neither does the deed contain any provision forfeiting or terminating the grantee's right to mine and remove all of such minerals which were so conveyed. The two-year surface privilege provision does not purport to terminate such right. Such provision is wholly foreign to the estate in the minerals themselves which is conveyed by the deed. The scope of this mere surface impediment cannot by any construction be extended to the subsurface minerals and rights therein which are the subject of the grant itself.

Petitioners contend that a covenant should be implied to terminate and forfeit the oil and gas rights conveyed by this deed. Under the Illinois law a forfeiture can not be based upon an implied covenant. *Conductors' Benefit Association* v. *Tucker*, 157 Ill. 194, 200; *Sears Roebuck & Co.* v. *Higbee*, 225 Ill. App. 197, 201; *McClenathan* v. *Davis*, 243 Ill. 87. Petitioners concede that Respondents still own the coal in and under said premises, said coal having been conveyed by the same language and in the same granting clause as the oil and gas.

Petitioners' position and argument is entirely unsound. It completely overlooks the fact that a landowner has well-recognized property rights in underlying oil and gas wholly apart from the incidental uses to which the surface may be put in mining such minerals, and further

overlooks the fact that oil and gas may be taken from beneath a tract of land without entering upon the surface, either by draining such products from wells drilled on the margin of adjoining land or by directional or slant drilling.

Of what value are Respondents' property rights in the oil and gas without surface privileges? Some of the rights or incidents of ownership of the oil and gas estate in Illinois without the use of the surface for the production of the oil and gas may be enumerated as follows:

(a) The right to install equipment *under* the surface to mine and remove the oil and gas.

(b) The right to prevent others from operating *under* the surface for the oil and gas.

(c) The right to keep others from operating *upon* the surface to remove the oil and gas under the land.

(d) To own all oil when found by any operations to produce oil from said land or *upon* or *under* the surface of the land.

(e) To use such oil when found through any such operations *upon* or *under* the surface of the land.

(f) To produce oil from said land by drainage, by drilling on adjoining tracts, or by directional drilling from adjoining tracts of land.

(g) To market such oil and receive the benefits therefrom. These are a few of the rights of ownership that the owner of property rights in the oil and gas would have irrespective of his right to use the surface to produce the same.

Respondent, Chicago, Wilmington & Franklin Coal Company, claims to hold freehold property rights in the oil and gas underlying some 3,200 acres of land in the imme-

diate vicinity of the eighty-acre tract here involved. On September 6, 1940, it executed an oil and gas lease covering such tract and including the present tract and therein leased unto the lessee the exclusive right to produce all of the oil, gas, casinghead gas and casinghead gasoline underlying all of the section of land in which the present tract is located, other than the Southwest Quarter (SW¼) of such section. Such lease was offered in evidence as Plaintiffs' Exhibit III, and appears at p. 93 of the Record. Such lease covers the major portion of the oil and gas pool of which the eighty acres is a part. Thus, whether wells be drilled upon the surface of this tract or upon the surface of adjoining tracts, the bulk of the recoverable oil lying beneath the land here involved will be recovered by the Chicago, Wilmington & Franklin Coal Company and their lessees. Thus, it is erroneous to assume that the denial to Respondents of the right to use the surface of the eighty acres, in which Petitioners claim an interest, in drilling for oil and gas is to deny them any enjoyment of the property conveyed under the deed, for, as we have seen, the right to use the surface is not essential to the enjoyment of such property.

Petitioners' argument resolves itself down to the arbitrary position that without any rhyme or reason surface rights are the important elements of a grant of oil and gas, and that without such surface rights no property interest of any kind or character may be owned by a grantee. It is asserted that such is the law in the State of Illinois. It is claimed that such was the holding of that Court in *Watford Oil & Gas Co.* v. *Shipman,* 233 Ill. 9, 84 N. E. 53; *Ohio Oil Co.* v. *Daughetee,* 240 Ill. 361, 88 N. E. 818; *Poe* v. *Ulrey,* 233 Ill. 56, 84 N. E. 46; *Triger* v. *Carter Oil Co.,* 372 Ill. 182, 23 N. E. (2d) 55.

Typical of the language appearing in such decisions and

upon which Petitioners so strongly rely is the statement found in *Triger* v. *Carter Oil Company*, 372 Ill. 182, 185, 23 N. E. (2d) 55, 56, as follows:

> "It is the settled law in this state that oil and gas in place are minerals but by reason of their fugacious qualities they are incapable of an ownership distinct from the soil. They belong to the owner of the land only so long as they remain under the land, and if the owner makes a grant of them to another, it is a grant only of the oil and gas that the grantee may take from the land. No title to it vests in the grantee until it is actually removed from the land."

It will be noted that the Court in no way states that surface rights are indispensable to a grant of oil and gas nor is it stated that the only right possessed by a landowner with respect to underlying oil and gas is the right to use the surface of the land in drilling for and producing such substances. It is stated that oil and gas in place by reason of their fugacious qualities are incapable of an ownership distinct from the soil itself. This, however, is not and should not be understood to be a statement that the only right of the landowner is the right to use the surface of the land in operating in connection with such minerals. It is, rather, the statement that such rights as the landowner has in such minerals arises out of his ownership of the soil, that such ownership vests in him the exclusive right to everything lying beneath the land, but that by reason of the fugacious quality of the minerals involved, such landowner does not have title to any particular quantity of same. A landowner, by virtue of his ownership of the soil, has the right to take such oil and gas as may be produced from beneath his land and upon such production he acquires an absolute title to such substances so produced. Likewise, he has the right at all times that others shall not take such substances by operations

either upon or below the surface of his land, and the right to take such oil and gas as may be produced from a well bottomed beneath his land is a property right which may be transferred to another. The right to use the surface, however, is but one of the incidental rights which accompany the landowner's estate in the oil and gas and is not of itself the essence of the estate. The estate normally may be more conveniently enjoyed by wells drilled upon the surface of the land. However, the mere fact that the wells may be drilled upon adjoining lands and bottomed beneath his land in no way affects his exclusive property right in and to the substances produced thereby from beneath the land and he could enjoin such drilling and require an accounting for any oil so produced.

The several recent California slant drilling decisions exemplify this principle. See *People* v. *Brunwin,* 2 Cal. App. (2d) 287, 37 P. (2d) 1072; *Union Oil Co.* v. *Reconstruction Oil Co.,* 20 Cal. App. (2d) 170, 66 P. (2d) 1215; *A. E. Bell Corporation* v. *Bell View Oil Syndicate,* 24 Cal. App. (2d) 587, 76 P. (2d) 167; *Pacific Western Oil Co.* v. *Bern Oil Co.,* 13 Cal. (2d) 60, 87 P. (2d) 1045.

It is not necessary that any surface rights be granted in order to constitute a valid conveyance or exclusive right to either produce or receive the oil and gas.

Respondents say that the property or ownership of the oil and gas estate in Illinois land is simply an aggregate of incidents, privileges and benefits pertaining to the oil and gas or dominion over it. Only in its strictest sense is "property" defined to mean a physical thing. In its ordinary sense ownership of property has a broader meaning. It means a physical thing or right or privilege plus the rights of dominion, possession, power and disposition which may be acquired over it to the exclusion of other

persons. In Illinois, the right to mine and remove oil and gas is this aggregate of rights, privileges and benefits and is a corporeal interest in the land itself. *Transcontinental Oil Company* v. *Emmerson* (1921), 298 Ill. 394, 131 N. E. 645.

In *Rigney* v. *City of Chicago*, 102 Ill. 64, it is said (italics ours):

> "Property in its appropriate sense, means that dominion or indefinite right of user and disposition which one may lawfully exercise over particular things or subjects, *and generally to the exclusion of all others*, and doubtless this is substantially the sense in which it is used in the constitution; yet the term is often used to indicate the *res* or subject of the property rather than the property itself."

The Supreme Court of Illinois has repeatedly recognized that a landowner may create a separate estate in the surface and a separate estate in the oil and gas. As the Court said in *Updike* v. *Smith*, 378 Ill. 600-605:

> "A landowner may create a separate estate either by a deed such as was considered by this court in the *Triger case, supra*, or by a grant of the land to a third person with an express reservation of the oil and gas. (29 A. L. R. 586.) A testator may devise separate tracts covered by one lease, excepting the oil thereunder, and devise his rights in the oil to all the named devisees as tenants in common *Conover* v. *Parker*, 305 Ill. 292."

It is Respondents' basic position that under the law of Illinois a landowner's property right in underlying oil and gas may be severed from his right in the surface of the land; that such is the case is demonstrated by the fact that such right of severance has always been recognized by the Illinois Court.

In *Renfro* v. *Hanon,* 297 Ill. 353, 130 N. E. 740, at p. 741, the Court, in holding that possession of the surface estate was not possession of the mineral estate, severed by a grant of "all the coal, lead, oil, silver, gold, rock, fluids, ores, metals, and all other minerals" said:

> "Regardless, however, of any question of payment of taxes, it was necessary to prove possession of the minerals, and there could be none in law after the severance. The title to the minerals was severed by the deed from Richard Palmer and wife to R. N. Barbour, and where that is the case the possession of the surface does not carry with it the possession of minerals in place under the surface. By a severance separate estates are created, which are held by separate and distinct titles, and each estate is incapable of possession by the mere occupancy of the other; and this is so even if the instrument constituting color of title purports to convey the whole property, as the will of Palmer did. * * *
>
> "* * * Disregarding that fact, however, title could not be acquired under the Limitations Act without possession, and there could be no possession after the severance of the estates. The complainants did not prove title under the Statute of Limitations."

This same rule is announced in the case of *Kinder* v. *La Salle County Coal Co.,* 301 Ill. 362, 364, 367, 133 N. E. 772, where it is said (italics ours):

> "By a deed dated March 25, 1867, he *severed the underlying mineral estate in the land from the surface estate in the land,* and conveyed by warranty deed to the Chicago Coal Company, a corporation, 'all the bituminous or stone coal, together with the right to mine the same,' and by the same instrument quit-claimed 'all the right in or title to the oil and minerals, of every description, underlying the above and foregoing described lots, tracts and parcels of land.' * * *
>
> "Title to the minerals *distinct* from title to surface of land, may be proven in exactly the same way

as title to the *surface.* (*Catlin Coal Co.* v. *Lloyd,* 176 Ill. 275.) Title to the mineral stratum may therefore be shown by proof of adverse possession, but the difficulty with respect to getting title of such an estate by adverse possession is found in the difficulty of getting and proving actual possession. By a severance separate estates are created which are held by separate and distinct titles, and each estate is incapable of possession by the mere occupancy of the other."

Also see the case of *Uphoff* v. *Trustees of Tufts College,* 351 Ill. 146, at page 154 (184 N. E. 213), where it is said (italics ours):

"It is our opinion that the title to the coal and minerals was severed by the deeds from Forbes and Magee to Sutliff, Chapman and Richards in 1869 and 1870, respectively. *Where such severance has occurred the possession of the surface does not carry with it the possession of the minerals under the surface. Separate estates are created* by a severance, which are held by separate and distinct titles, and each estate is incapable of possession by the mere occupancy of the other; and this is so even if the instrument constituting color of title purports to convey the whole property. (*Renfro* v. *Hanon,* 297 Ill. 353; *Catlin Coal Co.* v. *Lloyd,* 180 id. 398; *Kinder* v. *LaSalle County Coal Co.,* 301 id. 362, and cases cited.)"

The same rule is recognized in the case of *People* v. *Bell,* 237 Ill. 332, 86 N. E. 593, where the Court held that a mining right to dig for coal and other minerals included oil and created an estate which could be taxed separate and apart from the surface.

The statement by the Illinois Courts that oil and gas are incapable of ownership distinct from the soil, that no title to the oil vests in the grantee until it is actually removed from the land, but that oil and gas belong to the

owner of the land only so long as they remain under the land, and if the owner makes a grant of them to another, it is a grant only of the oil and gas that the grantee may take from the land, in no way changes this rule. Since no one knows for certain whether or not there is any oil under a piece of land and since oil is fugacious in nature, the Illinois Courts regard a grant of oil and gas only as a transfer of the right of the owner to take whatever oil and gas may be under the land whenever he shall see fit to produce them. That, however, in no way means that there must be a grant of a surface right along with the mineral rights, in order to constitute a conveyance of the exclusive rights to the oil and gas. It must be conceded that the grantee in a mineral deed which conveys oil and gas has a right to sink wells on the margin of adjacent lands as effectively as natural conditions will permit, or to employ the improved method of slant drilling by projecting its wells and drawing oil and gas from greater distances.

In the recent case of *Tallman* v. *E. I. & P. R. R. Co.*, 379 Ill. 441, the Supreme Court of Illinois held that although a railroad company had an exclusive easement to a railroad right of way, still the title to the oil and gas did not pass but remained in the grantor of the right of way and his assignees. There the persons owning the oil and gas had no surface privileges in the railroad right of way.

In the case of *Triger* v. *The Carter Oil Co.*, 372 Ill. 182, 23 N. E. (2d) 55, heretofore cited by us, the guardian ad litem contended that the deed did not convey any oil and gas. The Carter Oil Company contended that the mineral deed was an absolute conveyance of the minerals, the title vesting in the oil and gas being deferred until they were reduced to actual possession, when

the property becomes absolute, and relied on the case of *Cuff* v. *Koslosky,* 165 Okla. 135, 25 Pac. (2d) 290, hereinafter cited by us, and also the case of *Callahan* v. *Martin,* 3 Cal. (2d) 110, 43 Pac. (2d) 788, pointing out that both Oklahoma and California are nonownership States insofar as ownership of the oil and gas are concerned. The Supreme Court of Illinois did not cite these two cases in the opinion, but apparently followed their theory, because it was held that the mineral deed did convey the right to the oil and gas. It is true that in that case the mineral deed also granted the right to the grantee to enter upon the land for the purpose of prospecting and operating wells, which the Court mentioned, but the decision was not placed upon the theory that it was necessary that such a surface right be granted before the deed could be operative.

The Court in that case (*Triger* v. *The Carter Oil Co.,* 372 Ill. 182, 23 N. E. (2d) 55, at p. 56) held that the heirs of a grantor who had conveyed all her interest in the oil and gas prior to her death while inheriting the surface, inherited no interest in the underlying oil and gas. The Court said (italics ours):

> "* * * At the time of the execution of the deed Mary C. Horn only owned the oil and gas in an undivided one-third of the whole and this was subject to the leasehold interest of the Carter Oil Company. *Cross-appellants did not inherit any interest in the oil and gas. Their inheritance was in the land, devoid of any interest in the oil and gas.*"

The same rule as announced in the case of *Tallman* v. *E. I. & P. R. R. Co.,* 379 Ill. 441, was recognized by the Supreme Court of Illinois in another recent case, being the case of *The Texas Company* v. *O'Meara,* 377 Ill. 144, 36 N. E. (2d) 256, wherein it was held that even though a

drainage district had a deed for a right of way one hundred feet wide over the surface of certain premises, nevertheless, the ownership of the oil and gas did not pass with the surface so conveyed to the drainage district but remained in the grantor. If Petitioners' theory was correct, the grantor could not have retained any ownership or rights in the oil or gas under this right of way because he did not own the surface.

Under the so-called "non-ownership doctrine" followed by Illinois, and also by certain other oil producing states, such as Oklahoma, California, Kentucky and Indiana, a landowner is said to have no title to any specific quantity of underlying oil unless and until he actually reduces same to possession. Such conclusion is arrived at by reason of the fugacious quality of such products and the fact that they may be drained from beneath the land by adjoining owners. The doctrine extends no further, and in all such states it is recognized that a landowner has property rights in such substances even before they are produced. Such rights include the exclusive right to take such substances as may be produced by wells bottomed beneath the land.

In Summers on Oil and Gas, Vol. 1 (Perm. Ed.), page 350, it is pointed out (italics ours):

> "It is believed that much of the confusion and apparent contradiction relative to the nature of the legal interest created by grant or exception of oil and gas is due to the misuse of such terms as 'property', 'title', and 'ownership'. The nature of the landowner's interest in oil and gas, and of the interest which he may create in others, is necessarily determined by what the courts have held that he may and may not do, and what others may and may not do as against each other, in respect to the oil and gas under his land. In deferring to the interest, some of the courts have said that the landowner or his

> grantee has a title in the oil and gas; others have said that he has a privilege to take them and that such privilege is exclusive, meaning thereby that he has a right that others shall not take by operations on his land; and still others have said that he owns the oil and gas. It is believed that in most of these instances the courts meant about the same thing; that is, that the landowner, although his legal relations in respect to oil and gas are not such that he may be said to own the oil and gas that is actually under his land, *nevertheless has privileges of taking them and rights that others shall not take them, and that these relations create in him a property interest; that this property interest can be transferred to another in fee or for life.*"

It should be observed that the property interest referred to is an interest in the oil and gas itself and not merely in the surface of the land.

The following quotations from decisions of the courts of last resort of oil producing states adhering to the same theory of ownership followed by Illinois uniformly recognize that a landowner has a property right in underlying oil and gas wholly apart from the incidental right of using the surface in production operations, such property right being a vested interest in such products themselves.

In *Cuff* v. *Koslosky*, 165 Okla. 135, 25 P. (2d) 290, at pages 292-293, the Supreme Court of Oklahoma, after pointing out that "a landowner does not own absolute title in the gas and oil that may permeate below the surface," said (italics ours):

> "However, an owner of land may convey, except, or reserve his right to the oil and gas beneath it. This private property right is the proper subject of a sale. * * *
>
> "The title to the oil and gas in place by such conveyance, grant, or exception does not vest, and no ownership of the minerals in place is acquired until the grantee finds and captures the same, although

> this valuable right as outlined, to-wit, to obtain and reduce the oil and gas to possession, *creates some kind of a property interest,* or an incorporeal right in the land. Nevertheless, this character of interest is property. * * * *It is an absolute right to the oil and gas, a quantum of the corpus of the land, but under our decisions no title to the oil and gas obtains until the same have been captured. In reality it is an absolute conveyance of these minerals in place with title vesting in the oil and gas deferred until they are reduced to actual possession, when property in them then becomes absolute. It amounts to the creation of a separate estate.* * *
>
> *"The grant under the mineral deed vests a permanent present interest in the mineral estate;* * * *."*

The California court, in *Dabney-Johnston Oil Corporation* v. *Walden*, 4 Cal. (2d) 637, 52 P. (2d) 237, 243 said (italics ours):

> "The owner of land has the exclusive right on his land to drill for and produce oil. This right inhering in the owner by virtue of his title to the land is a valuable right which he may transfer. The right when granted is a profit *a prendre, a right to remove a part of the substance of the land.* * * *Thus, although the oil and gas in place doctrine is rejected, interests in oil rights which are estates in real property may be granted separate and apart from a grant of surface title."*

In the case of *Gray-Mellon Oil Co.* v. *Fairchild*, 219 Ky. 143, 292 S. W. 743, 745, it was stated:

> "Oil and gas in the earth stand much as water percolating under the earth. The owner in fee owns to the center of the earth. But he does not own a specific cubic foot of water, oil, or gas under the earth until he reduces it to possession. The reason is, these substances are fugitive, and the water, oil, or gas which is under his land today may be elsewhere tomorrow. He is only entitled to hold as his own the water, oil, or gas which he finds under his

land and reduces to possession. But the right to explore for these substances and to reduce them to possession, if found, is a valuable part of his property. It is an interest in the land springing out of his ownership of everything above and below the surface. While the oil is fugitive, the sand bearing oil is as stationary as a bank of coal. The only practical use to which the oil-bearing sand can be put to is to get the oil out of it. The exclusive, permanent right to get the oil from the sand is necessarily a right to a part of the land, for to use the sand in any other way would be to destroy the right to extract the oil from it, as the sand must be allowed to remain as it is for the oil to flow through it."

It is thus seen that a landowner has certain definite rights in and to the oil and gas underlying his land. Such rights are termed "property." It matters but little whether the landowner is said to have title to the oil and gas lying beneath his land or to merely have the exclusive right to take such substances therefrom. In any event he has a certain and definite property right therein. The courts of every jurisdiction in the country recognize the right of a landowner to transfer this property interest to another and thereby sever the estate in the minerals from the estate in the surface. When such a grant is executed, it operates to vest in the grantee every right which the landowner previously had in such substances and thereafter such grantor has no right, title, interest or estate in and to such minerals. Having no right thereto, certainly it could not be thought that he should be privileged by operations conducted on the surface to take from beneath the land the minerals which he had conveyed to another. The mere fact that such minerals might be more accessible to him than to his grantee does not in any way alter or change the situation. By solemn conveyances John P. Minier and Rosa M. Minier, his wife,

Petitioners' grantors, conveyed away all of their right, title and interest in and to all of the underlying oil and gas. Having done so, they and their grantees are not now in position to take such minerals or claim title to any of same which may be produced from these premises. Such was the holding of the Trial Court and Circuit Court of Appeals and it is, of course, correct.

It matters not whether the landowner is viewed as having absolute title to underlying oil and gas or only as a qualified ownership thereof. Whatever be the nature of his interest it is held in all of the states, including Illinois, that his interest therein may be severed from his interest in the surface estate and transferred to another. Thus, upon the execution and delivery of the present deed all of the interests of the grantors in the underlying oil and gas were conveyed unto the grantee, and this irrespective of the exact nature of their interest therein. The conveyance here of "all the coal, oil and gas" vested in grantee all of grantors' interest therein. It is therefore absurd to suppose that a mere impediment to or loss of a surface user, could affect the grantee's property right in such products.

Cases involving analogous situations and holding that exclusive possession of the surface by another, so that the owner of the oil and gas may not enter upon the surface, has no effect upon the property rights of the owner of the oil and gas are *Hamilton* v. *Foster,* 272 Pa. 95; 116 Atl. 50, and *Consumers' Gas Co.* v. *American Plate Glass Co.,* 162 Ind. 393; 68 N. E. 1020.

Petitioners' position is not supported by any decision of any court. It violates every known and recognized principle with respect to a landowner's right in underlying oil and gas. It wholly misconstrues the doctrine of ownership adopted by the Supreme Court of Illinois. Un-

der no theory advanced would Petitioners or any of them be entitled to the oil and gas underlying the land and therefore Respondents were entitled to the injunction granted unto them by the lower court.

Counsel also argue since there was no directional drilling until 1930 that it could not be claimed that this deed passed the oil and gas if it had to be obtained by directional drilling. We wish to point out in this connection that this is not a matter of determining the intention of the parties with reference to whether oil and gas were intended to be conveyed. The deed expressly conveys the oil and gas, and it was just as possible to obtain the oil and gas by directional drilling in 1914 when the deed was made, as it was in 1930. The fact that directional drilling was not discovered until 1930 did not permit a different meaning being given the language of the deed which expressly conveyed the oil and gas. This was not a matter of construction. We do not see how this argument militates against Respondents' rights or contentions in the present case.

The conveyance of the oil and gas vested in Respondents a property right which prohibited the Petitioners from taking or attempting to take the oil and gas from this property. The Illinois Court, as above set forth, has stated that it will protect this property right by injunction. Whether or not the Respondents could have recovered all or part of the oil under this premises is entirely immaterial insofar as the Respondents' right to an injunction is concerned. Under the Illinois cases cited in Petitioners' briefs the rule is specifically announced that the title to the oil and gas when recovered vests in the mineral grantee. Therefore, whether the oil is recovered by Respondents or Petitioners during the course of this litigation, nevertheless, upon its recovery, the title to the

same vests in Respondents. Petitioners stipulated (R. P. 56-62) that the premises should be drilled pending this litigation by the respective parties, and the oil produced therefrom during the pendency of this suit without prejudice to the rights of either party. Most certainly Petitioners cannot now argue with any logic that Respondents do not own the oil and gas produced because Petitioners have produced part of this oil under the stipulation or because Respondents have not proved how much oil they could have produced by directional drilling or drainage.

## (III)

**The decision of the Circuit Court of Appeals is not in conflict with the decision of Eighth Circuit Court of Appeals in the case of Butler v. McGorrisk, 114 Fed. 300.**

The Petitioners, in their brief, cite the case of *Butler* v. *McGorrisk,* 114 Fed. 300. That case involved property in the State of Iowa, and not in the State of Illinois, and involved local law of the State of Iowa and not of the State of Illinois. Furthermore, it is not inconsistent with the ruling of the Circuit Court of Appeals in the present case, for the reason that in that case was involved the construction of a grant and the Court held that the language of that grant simply conveyed all of the coal which grantee should mine and remove within the time limited. The present case does not involve a similar grant because here all of the oil and gas and coal is granted without limitations. There is no contention by the Petitioners that the rights of the Respondents to the coal have ended. Most certainly, there is no reason for their contention that the Respondents' right to the oil and gas has ended.

Petitioners also cite certain authorities in other jurisdictions with reference to the construction of deeds of standing timber, in which they say that it is held that the time limit on the right of removal of timber must be construed as limiting the title to the timber. The Appellate Court of the State of Illinois has held to the contrary in the case of *Walker* v. *Johnson,* 116 Ill. App. 145, at pages 145-148, where the Court said:

> "Where one owning standing and growing timber, with the right to cut and remove the same within a specified period, sells to another a certain portion of such timber, with the right, likewise, to cut and remove the same within a period specified, the purchaser acquires more than a mere license, but, upon the other hand, becomes the owner of such growing timber, coupled with a right to cut and remove the same, the time limit in question being regarded as a covenant and not as a condition upon which to base a forfeiture. * * *
>
> "I have this day sold to George W. Walker the timber standing and growing on W. ½ N. E. ¼; and E. ½ N. W. ¼; and S. W. ¼ N. W. ¼; and S. W. ¼; N. W. ¼ S. E. ¼; 32, 6 l-e. in Fayette County, Illinois. Said timber is to be taken off within five years from this date. * * *
>
> "Under the contract with Abbott, the defendant became the owner of the growing timber, coupled with the right to cut and remove it. This was more than a mere license; it was a substantial part of the thing sold, paid for, and delivered so far as it was capable of delivery. *Con. Coal Co.* v. *Peers, et al.,* 150 Ill. 344. *The time limit for removal of the timber is to be treated as a covenant, and not a condition, upon which to base a forfeiture.*"

The timber cases cited by Petitioners have no application to the present case and, as heretofore pointed out, under the settled Illinois authorities, the grant of the oil and gas created a property right in real estate which was, as pointed out in the case of *Transcontinental Oil Co.* v. *Emmerson,* 298 Ill. 394, a corporeal hereditament.

Clearly the rulings of the two Federal Courts in the State of Illinois determining the Illinois law as to the property rights in the oil and gas in question in this litigation were correct and followed exactly the Illinois precedents and authorities applicable to the present situation.

## CONCLUSION.

The Circuit Court of Appeals affirmed the District Court in holding that the property rights in the oil and gas in this case were vested in the Respondents and in so doing followed the established judicial precedents.

It is, therefore, respectfully submitted that the petition presents no grounds which would justify the exercise by this Court of its power to grant the writ of certiorari.

Respectfully submitted,

CRAIG VAN METER,
Mattoon, Illinois,
FRED H. KELLY,
Mattoon, Illinois,
*Attorneys for Respondent,*
SHELL OIL COMPANY, INCORPORATED, a Corporation,
THURLOW G. ESSINGTON,
231 S. LaSalle St.,
Chicago, Illinois,
*Attorney for Respondent,*
CHICAGO, WILMINGTON & FRANKLIN COAL COMPANY, INCORPORATED, a Corporation.

F. C. LOVE,
First National Building,
Oklahoma City, Oklahoma,

ROY C. MARTIN,
Benton, Illinois,

CARTER HARRISON,
Benton, Illinois,
*Of Counsel.*